Gina Harrison
Director
Federal Regulatory Relations

1275 Pennsylvania Avenue, N.W., Suite 400
Washington, D.C. 20004
(202) 383-6423

PACIFIC TELESIS
Group-Washington

January 11, 1996

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
Mail Stop 1170
1919 M Street, NW, Room 222
Washington, DC 20554

Dear Mr. Caton:

Re: *WT Docket No. 95-157, RM-8643 - Amendment to the Commission's Rules Regarding a Plan for Sharing the Costs of Microwave Relocation*

On behalf of Pacific Bell Mobile Services, please find enclosed an original and six copies of its *"Reply Comments"* in the above proceeding.

Please stamp and return the provided copy to confirm your receipt. Please contact me should you have any questions or require additional information concerning this matter.

Sincerely,

Enclosure

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

Amendment to the Commission's Rules Regarding a Plan for Sharing the Costs of Microwave Relocation	WT Docket No. 95-157 RM-8643

REPLY COMMENTS OF PACIFIC BELL MOBILE SERVICES

JAMES P. TUTHILL
BETSY STOVER GRANGER

4420 Rosewood Drive
4th Floor, Building 2
Pleasanton, CA 94588
(510) 227-3140

JAMES L. WURTZ
MARGARET E. GARBER

1275 Pennsylvania Avenue, NW
Washington, D.C. 20004
(202) 383-6472

Attorneys for Pacific Bell Mobile Services

Date: January 11, 1996

TABLE OF CONTENTS

SUMMARY

Pacific Bell Mobile Services initiated the consideration of a microwave cost sharing plan. We are pleased that virtually all the commenters support the concept of cost sharing and agree that it will facilitate the relocation process. We have agreed to some changes in our original proposal in the interest of industry consensus and to make the plan easier to administer.

Although the cost sharing plan is straightforward from an administrative perspective, a clearinghouse is still needed to assist in the process. We are confident that the Personal Communications Industry Association is well qualified to assume this role.

Cost sharing principles should be applied to all emerging technologies. However, the rules for cost sharing should be service specific to take into account the unique technical and financial considerations associated with new service.

The microwave relocation guidelines must be refined to provide appropriate incentives for the microwave incumbents to enter into reasonable agreements without delay. The status quo does not serve the public interest. The incumbents are operating in an environment that encourages them to delay their relocation. The PCS licenses are faced with exorbitant demands which are delaying their deployment plans. In addition to our own recommendation, we strongly support recommendations, such as those by the Personal Communications Industry Association and the Cellular Telecommunications Industry Association, that are aimed at creating the necessary incentives so that the incumbents take a more reasonable negotiating posture in a timely manner.

We urge the Commission to act quickly with respect to cost sharing and changes in the relocation rules so that the deployment of PCS may proceed quickly and efficiently.

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REPLY COMMENTS OF PACIFIC BELL MOBILE SERVICES

I. INTRODUCTION.

The two major issues in this proceeding concern adoption of a microwave cost sharing plan and refinement of the microwave relocation rules. Achieving the efficient and equitable relocation of the microwave incumbents that will allow a rapid deployment of PCS service underlies both of these issues. It is critical that the Commission continue to move this rulemaking along quickly so that PCS deployment can proceed in a timely manner. In the following, Pacific Bell Mobile Services ("PBMS") responds to selected issues raised in the comments.

II. A COST SHARING PLAN HAS THE SUPPORT OF A MAJORITY OF THE COMMENTERS AND SHOULD BE INSTITUTED QUICKLY.

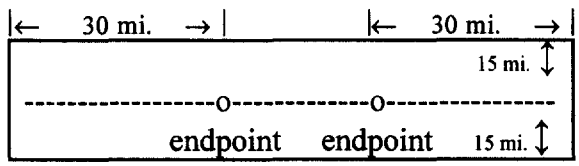
Almost all of the commenters support a rule that creates a cost sharing plan despite some disagreement on the technical aspects of the plan. We continue to support the basic components of the cost sharing plan that we proposed in our Petition for Rulemaking.

However, in some cases we agree with alternative components that were recommended by commenters.

A. The Interference Standard And The Trigger For A Cost Sharing Obligation Should Be based On The Proximity Threshold.

In our Petition, we proposed that interference would be determined by the criteria set forth in TIA Telecommunications System Bulletin 10-F.[1] The Personal Communications Industry Association ("PCIA") agreed that the Bulletin 10-F or some other accepted industry standard should be used to calculate interference.[2] However, several commenters that have already signed a cost sharing agreement among themselves have proposed what they call a "proximity threshold" to determine whether a subsequent licensee has an obligation to reimburse a prior licensee for relocation.[3]

The proximity threshold creates a rectangle around a cleared path by the use of a line extending through the endpoints of a path to a distance of thirty miles beyond each end point and another line extending perpendicular to the path 15 miles beyond each end point on each side. If a subsequent licensee turns on a fixed base station located within the rectangle, his cost sharing obligation is triggered.[4] The following diagram illustrates how the rectangle is drawn.[5]



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[1] Petition, May 5, 1995, p. 8.

[2] Comments of PCIA, June 15, 1995, p. 8.

[3] See e.g., GTE, p. 10; AT&T Wireless Services, pp. 7-9.

[4] GTE, pp. 5-6.

[5] GTE, Appendix, p. 2.

There are tradeoffs associated with the use of this triggering mechanism. It is easier to administer than the Bulletin 10 standard and should virtually eliminate disputes on whether a cost sharing obligation exists. However, even its supporters acknowledge that there will be instances in which a base station within the cost sharing rectangle would not have caused interference. Likewise, there will be instances in which base stations outside of the cost sharing rectangle would have caused interference. However, the supporters argue that there is a statistical averaging on the non-interference/interference occurrences inside and outside the rectangle.[6]

Our biggest concern is that the proximity threshold eliminates the ability of a subsequent PCS licensee who has engineered around the link to establish that he would not have interfered with the relocated link and thus has no responsibility for cost sharing. This occurs because the rectangle created does not have any relationship to actual interference. The only relevant factor is proximity, i.e., does the rectangle around one path overlap with the rectangle of another path thereby creating an obligation to share costs. Nevertheless, because we believe that the ease of administration is so critical to a workable cost sharing plan, we will support the use of the proximity locator threshold over Bulletin 10 since we believe its simplicity will benefit subsequent licensees who will be more easily able to determine their reimbursement responsibility. However, it should be noted for the proximity threshold to work, all PCS prior coordination notices must give exact coordinates of each base station. This is consistent with

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[6] GTE, p. 7.

section 21.100(d) of the Commission's rules but should also be clearly stated in the cost sharing rule.

B. Application Of The Cost Sharing Formula.

In our Petition to determine the amount that a subsequent PCS licensee would contribute, we proposed the use of the following formula:

$$R_N = \frac{C}{N} \times \frac{120 - (T_N - T_1)}{120}$$

We recommended that the only time the formula would be not be applied and the relocator would be entitled to 100% reimbursement would be in the case in which the relocator locates a link completely outside of his service territory.[7] Both PCIA and BellSouth offer a modification of this proposal in their comments.[8] The following table sets forth their proposal and indicates that the cost sharing formula would only apply in the B1 and B2 situations. In the interest of industry consensus we support the modification they propose.

REIMBURSEMENT TABLE
(Reimbursement Up To The Cost-Sharing Caps)

	Fully Within Relocator's Block	Partly Within Relocator's Block	Outside of Relocator's Block
Both Endpoints Inside Relocator's Market	A1 No Reimbursement	B1 Pro Rata Reimburse-ment	C1 100 Percent Reimbursement
One Endpoint Inside Relocator's Market	A2 50 Percent Reimbursement	B2 Pro Rata Reimbursement	C2 100 Percent Reimbursement
No Endpoints Within Relocator's Market	A3 100 Percent Reimbursement	B3 100 Percent Reimbursement	C3 100 Percent Reimbursement

[7] Petition, May 5, 1995, p. 10.

[8] PCIA, p. 32-34; BellSouth, p. 19.

C. The Cap In Reimbursement.

The industry consensus supported in the Comments to our Petition was a cap of $250,000, plus an additional $150,000, if a new tower was required.[9] BellSouth recommends that the $150,000 include modifications to towers in addition to new construction.[10] We agree. Without this modification, relocators approaching the $250,000 cap will have on incentive to build a new tower, even if a modification were more economical, in order to recover the expenses.

D. The Rules Should Not Drive A Decision To Provide Digital Equipment In All Cases.

Several commenters urge the Commission to find that the replacement of analog with digital equipment does not constitute a premium during the voluntary negotiation period or that it is required because digital equipment represents the state of the art.[11] Neither finding is unnecessary.

As we stated in our comments, if a cost fits in one of the categories of reimbursable expenses, it is subject to sharing.[12] If during the voluntary period, a relocator supplies the incumbent with digital equipment to replace analog equipment that fits within the cost category of radio terminal equipment. There is no need to make a finding about whether such equipment constitutes a premium. However, if the Commission specifically finds that the

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[9] Comments of PCIA, June 15, 1995, p. 5.

[10] BellSouth, pp. 18-19.

[11] BellSouth, pp. 13-14; Interstate Natural Gas Association of America, p. 2.

[12] PBMS Comments, p. 3.

replacement of analog with digital does not constitute a premium, every incumbent will insist on digital facilities. It should be completely up to the PCS licensee and the incumbent to decide what is the most appropriate radio equipment to achieve comparability and that equipment should be included in compensable costs. Replacement with digital facilities should not be compelled by any rule.

E. Calculation Of The Date That Reimbursement Rights Begin And The Date That The Subsequent Licensee's Payment Obligation Arises Should Be Tied To The Issuance Of Prior Coordination Notices.

Commenters offered a variety of recommendations for these dates. BellSouth recommends that reimbursement rights are acquired on the date that the incumbent actually ceases operation, rather than the date a relocation agreement is negotiated.[13] AT&T wants depreciation calculated from the date that the PCS provider places its system in service.[14] GTE stated that the subsequent licensee should be obligated to share costs at the time the subsequent licensee commences commercial operations.[15]

The problem with these dates is there can be some dispute about when they occur. For this reason, we continue to believe the recommendation we made in our comments is preferable because it is tied to an easily identified date that is not subject to dispute. Our recommendation relied on the date of a prior coordination notice ("PCN"). Accordingly, reimbursement rights would arise 60 days from the date that the relocator sent out its PCN.[16]

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[13] BellSouth, p. 11.

[14] AT&T, p. 10.

[15] GTE, pp. 16-17.

[16] PBMS, p. 2.

The obligation of a subsequent PCS licensee to pay under the cost-sharing formula would arise 60 days after the subsequent PCS licensee issued its PCN.[17]

F. PCIA Should Be Designated To Perform The Clearinghouse Function.

We continue to support a clearinghouse to administer the cost sharing plan. PCIA has indicated that they would like to be designated as the clearinghouse. We agree with PCIA that it is well suited for this role. We have had numerous discussions with PCIA representatives regarding the structure of the clearinghouse. We are confident that PCIA will administer the clearinghouse in an equitable and efficient manner.

G. UTAM Triggers For Cost Sharing Should Recognize Its Unique Position.

UTAM proposes a different cost sharing trigger based on the difference between licensed and unlicensed PCS. Specifically, it requests that its cost sharing obligation arise when:

⇒ a county is cleared of microwave links in the unlicensed allocation and UTAM raises a Zone 1 power cap as a result of third party relocation activities, or

⇒ a county is cleared of microwave links in the unlicensed allocation and UTAM reclassifies a Zone 2 county to Zone 1 status which could not have been done without third party relocation activities:[18]

We agree that it is reasonable to tie the cost sharing obligations of UTAM to the time at which unlicensed device manufacturers will benefit from increased deployment in a county because of microwave relocations. However, this alternative cost sharing trigger must not

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[17] Id. at p. 6.

be used to evade the cost sharing obligation. Therefore, if UTAM has not participated in cost sharing one year prior to the expiration of the cost sharing obligation, they must meet any obligations incurred by that time.

H. An Extended Relocation Period Should Be Limited To Those Licensees That Can Make The Necessary Showing.

As we indicated in our comments, we strongly support the Commission's recommendation that to be eligible for an extended period of relocation the public safety licensee must establish: 1) that it is eligible in the Police Radio, Fire Radio, Emergency Medical, or Special Emergency Services; 2) that it is a licensee in one or more of these services; and 3) that a majority of communications carried on the facilities involve safety of life and property.[19] In addition, we proposed that the Commission should look at the capacity of the licensee based on the initial channel loading contained in the incumbent's Form 402 application to establish whether a majority of its communications involve the safety of life and property.[20] For example, if the licensee's initial channel loading is for 100 channels, he would only qualify for extended relocation if 51 of those channels carried communications involving the safety of life or property.

The Commission's recommendation would require that documentation be provided to the PCS licensee upon request. Failure to provide such information would allow the

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[18] UTAM, pp. 2-3 and 5-6.

[19] PBMS, p. 11.

[20] Id.

PCS licensee to conclude that that special treatment is inapplicable.[21] The City of San Diego opposes the Commission's recommendation partly on the basis that "it puts the ultimate determination in the hands of a party that is inherently biased against finding that a system carries a majority of public safety traffic."[22] Consequently, the City of San Diego urges the Commission to accept a self-certification of public safety status.[23] This recommendation puts the determination squarely in the hands of a party that is biased to claiming public safety status. Furthermore, it should be noted that question 8 on Form 402 already requires a certification of public safety use. Licensees should not be given another opportunity to change their original certification. The Commission should reject this recommendation.

The Commission's recommendation with the addition we proposed is more appropriate because it requires specific information. It would be very difficult for a PCS licensee to act in an arbitrary manner when faced with specific information supporting public safety status.

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[21] Amendment of the Commission's Rules Regarding a Plan for Sharing the Costs of Microwave Relocation, WT Docket No. 95-157, RM 8643, ("NPRM") released October 13, 1995, para. 80.

[22]. City of San Diego, pp. 12-13.

[23] Id.

III. The Cost Sharing Principles Should Be Applied To All Emerging Technologies, But The Rules Should Be Service Specific.

The Commission asked whether cost sharing should be generally applicable to all emerging technologies.[24] BellSouth agreed in principle but recommended that each service have a service-specific rulemaking to take into account the unique technical, financial and other considerations presented by each service.[25] We agree.

IV. The Microwave Relocation Rules Need to Be Refined.

The Commission must ensure that its rule creates incentives for the incumbents to enter into reasonable agreements without delay. In its NPRM, the Commission acknowledged that some clarifications need to be made in the relocation rules.[26] The PCS licensees overwhelmingly support the need for change due to the unreasonable demands they have encountered. PCIA and Cellular Telecommunications Industry Association ("CTIA") did an excellent job in their comments providing examples of what some incumbents consider to be "reasonable" requests which actually seek extraordinary premiums.[27] The PCS licensees and their industry representatives offered a variety of recommendations for creating incentives for the incumbents to take more reasonable negotiating postures.

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[24] NPRM, para. 3.

[25] BellSouth, pp. 2-3.

[26] NPRM, paras. 68-85.

[27] PCIA, pp. 11-13; CTIA, Exhibit 1.

CTIA recommended that the Commission clarify that microwave incumbents are subject to the same good faith requirement in the voluntary period that is imposed on them in the one year mandatory period.[28] They also recommended that the Commission establish a rule that declares that demands by microwave incumbents that exceed twice the comparable cost are prima facie unreasonable and are evidence of bad faith during the mandatory period.[29] Furthermore, incumbents that fail to negotiate in good faith should have their licenses revoked and their right to be relocated to new spectrum terminated.[30]

PCIA recommended that rather than continuing the rule that permits a two year voluntary period, all incumbents be given a one-year mandatory period to be initiated by notification by the PCS provider that it would like to begin negotiations. PCIA also recommended that good faith negotiations be required at all times.[31] If an incumbent is found not to be negotiating in good faith, the PCS provider should only be required to tender a cash payment to the incumbent in an amount not to exceed the greater of the independent appraisals, and the incumbent's system should be converted to secondary status in ninety days.[32]

In our comments, we recommended that in the mandatory period, comparable facilities should consist of either the depreciated value of an incumbent's system based on 10 year straight line depreciation or the provision of uninstalled equipment consisting of comparable

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[28] CTIA, p. 7.

[29] Id. at p. 9.

[30] Id.

[31] PCIA, pp. 11-15.

[32] Id. at pp. 16-17.

radios, antennas, transmission lines and a frequency study, whichever the incumbent chooses.[33] We also recommended that when a finding is made that an incumbent is not acting in good faith during the mandatory period, the incumbent's relocation be converted to involuntary and the license declared to be in secondary status without compensation.[34] Likewise, we recommended that when the mandatory period expires, the incumbent should be converted to secondary status.[35] As CTIA notes, this is very much akin to the approach adopted by the Canadian government whereby incumbents who have not reached agreement during the initial two-year voluntary period are responsible for all their relocation costs during the involuntary period.[36]

The purpose of all of these proposals is to give the microwave incumbents the incentive to negotiate reasonable relocation agreements in a timely manner. While we prefer our own proposals, we would have no objection to the adoption of the CTIA or PCIA recommendation. What is important here is that the Commission needs to abandon the status quo and clarify or change its rules to remove the current incentives to hold the PCS licensees hostage. No one is served by that status quo. The incumbents are operating in an environment that encourages them to delay their relocation. The PCS licensees are faced with exorbitant demands which are delaying their deployment plans. The public interest is adversely affected because as Professor Milgrom indicated in the record the current rules will result in a loss of revenue to the Treasury in future auctions and the delay in instituting PCS will be borne by

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[33] PBMS, p. 8.

[34] Id. at pp. 9-10.

[35] Id. at p. 10.

[36] CTIA, p. 9.

consumers by paying higher prices for cellular services in the absence of PCS competition.[37] It is critical that the Commission take strong action on this matter immediately.

V. Licensing Issues Must Be Addressed.

A. Conversion To Secondary Status Should Occur By April 4, 2001.

In the NPRM the Commission proposed that the applications of the incumbents be amended by the Commission to secondary status on April 4, 2005.[38] Those incumbents commenting widely opposed this recommendation.[39] Southern California Gas Company even suggested that if PCS licensees do not relocate an incumbent by April 4, 2005 that they would forfeit their right to do so.[40] Part of their objection was that automatic conversion would create incentives for the PCS licensees to postpone relocation indefinitely.[41] These commenters ignore the fact that most PCS licensees must relocate the incumbents to provide an acceptable service offering. Moreover, PCS licensees have paid large sums of money for the licenses and certainly cannot afford to wait 10 years to begin earning money on that investment. On the contrary, PCS licensees have every incentive to relocate the incumbents as soon as possible. For this reason, we proposed that the Commission only accept renewals for primary status up to April 4, 1996, which would allow incumbents to retain primary status up to April 4, 2001.[42]

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[37] Ex Parte of PBMS, September 13, 1995, Statement of Professor Paul R. Milgrom.

[38] NPRM, para. 90.

[39] See e.g., UTC, pp. 30-33; National Rural Electric Cooperative Association, p. 8.

[40] Southern California Gas Company, p. 13.

[41] See e.g., American Gas Association, p. 5; American Public Power, p. 6.

[42] PBMS, pp. 12-13.

The Commission must keep in mind that the incumbents are operating in a band that has been sold for another use. They do not have an indefinite right to occupy the band on a primary basis. The American Petroleum Institute claims that a conversion to secondary status could constitute an unlawful taking of property without just compensation.[43] Radio licenses do not create a property right. Section 301 of the Communications Act specifically states "It is the purpose of this chapter, among other things, to maintain the control of the United States over all the channels of radio transmission; and to provide for the use of such channels, but not ownership thereof, by persons for limited periods of time ...."[44]

It is entirely within the Commission's authority to modify its rules in the public interest. In this case, allowing one more renewal period prior to April 4, 1996 is consistent with the public interest. Six additional years should adequately allow for an orderly transition to another frequency. Under the current rules, in most cases the voluntary and mandatory relocation periods and involuntary period will have expired and the relocations should have occurred.

B. The Rules Must Provide For The Ceasing Of Operations Of Secondary Incumbent Licensees.

AT&T Wireless requests that the Commission clarify that PCS licensees do not have an obligation to relocate secondary licensees. AT&T recommends that secondary incumbent licensees should be required to cease operations when asked to do so by PCS

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[43] American Petroleum Institute, p. 19.

[44] 47 USC §301 (West 1995) (emphasis added).

providers, or alternatively, on a date certain.[45] We agree. In addition, the Commission must institute some process to deal with secondary microwave incumbents that fail to cease operations on their secondary links at the appropriate time.

VI. CONCLUSION.

The Commission has worked through many divisive and difficult issues in preparing the way for the introduction of PCS service. As the record in this proceeding indicates, some additional action is required for the relocation of microwave incumbents to move quickly and smoothly and at a reasonable cost. We are pleased that the need for a cost sharing plan is widely recognized and supported by the commenters. Refinement of the relocation rules is a more contentious area, but even there the record strongly supports the need for some changes to provide the appropriate incentives for reasonable and timely relocation agreements. The status quo encourages delay through both the lack of a cost sharing plan and the lack of incentives for

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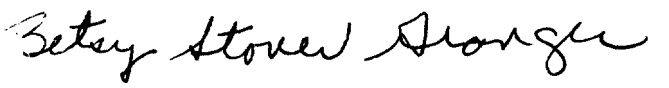
[45] AT&T Wireless, p. 13.

the incumbents to negotiate quickly and reasonably. We respectfully request that the Commission act immediately to remedy this situation.

Respectfully submitted,

PACIFIC BELL MOBILE SERVICES



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Its Attorneys

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